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IN THE

Supreme Court of the United States

October Term, 1963
No. 639

STUART ARONOFF; JASON and ILEYEN BERNIE; GLORIA BOYD; ALTHEA G. CASE; CLIFFORD R. GANS; NATHAN and IDA FRANKLIN; BUD CHARLES GORE and PHYLLIS GORE; MAX and TURA KLEIGER; SAMUEL ROBINSON and ANNA ROBINSON; HYMEN SMITH and SEVERT SMITH; MARTIN SIRODY and KATHRYN SIRODY; CLYDE E. and MARY JO. SHIELDS; HARRY M. SUGARMAN and MARY SUGARMAN; MAX STEIN and FAY STEIN; ROY C. TROEGER and VIRGINIA RUFF TROEGER; RICHARD H. and PATRICIA TROEGER; HARLAND and IRENE WEIR,

Appellants,

vs.

FRANCHISE TAX BOARD of the State of California; STATE BOARD OF EQUALIZATION; JOHN W. LYNCH; GEORGE E. REILLY; PAUL R. LEAKE; RICHARD NEVINS and ALAN CRANSTON as members of the State Board of Equalization,

Appellees.

Appeal From the Supreme Court of the State of California.

REPLY TO MOTION TO DISMISS OR AFFIRM.

Appellants respectfully reply to the Brief of the Attorney General of California filed in support of its Motion to Dismiss or Affirm.

California's plea makes necessary citation of the following additional authorities in support of the jurisdiction of this Court.

Poindexter v. Greenhow, 114 U. S. 729;
Ex parte Young, 209 U. S. 123;
Young v. Ragen, 337 U. S. 235;
General Oil Co. v. Crain, 209 U. S. 211;
Marcus v. Property Search Warrant, 367 U. S. 717;
Bantam Books v. Sullivan, 9 L. Ed. 2d 584;
Ward v. Lane County, 253 U. S. 17;
Iowa-Des Moines Bank v. Bennett, 284 U. S. 239;
Fiske v. Kansas, 274 U. S. 380;
Missouri R.R. & Co. v. Tucker, 230 U. S. 340.

The withdrawal of effective State remedies for protection of a Federal right is a denial of due process of law; and a decision which denies such protection gives effect to the law and the decision is reviewable on appeal. (*General Oil Co. v. Crain*, 209 U. S. 211, 228; *Poindexter v. Greenhow*, 114 U. S. 270.)

"To take away all remedy" this Court ruled in *Poindexter v. Greenhow*, 114 U. S. 230, 303, "for the enforcement of a right [under the U. S. Constitution] is to take away the right itself. *But this is not within the power of the State.*"

A refund action will not remedy or ratify a prior encroachment of a Federal right. (*Poindexter v. Greenhow*, 114 U. S. 270.)[1]

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[1]In *Poindexter*, this Court rejected a contention similar to that now made by California. The rejected contention of Virginia was stated as follows:

"It is urged upon us, however, that in a revenue system, a provision of law which gives to a party complaining of

In *Poindexter*, Virginia's taxing statute, as California's here, provided "no writ for the prevention of any revenue claim, or to hinder or delay the collection of the same, shall in any wise issue, either *injunction, supersedeas, mandamus, prohibition or any other writ or process whatsoever;* but in all cases, if, for any reason, any person shall claim that the revenue so collected of him was wrongfully or illegally collected, the remedy for such person shall be as above provided."—*i.e.* by refund.

This Court held in *Poindexter* that, in the context of that case, a refund action was "no remedy whatsoever," and that "this wrong [deprivation of constitutional right] is without remedy by any law of Virginia" and reversed on *appeal*, the final decision of a Virginia Court upholding the Virginia tax refund statute as an exclusive remedy.

State procedural niceties may not close the door to effective consideration of Federal rights. (*Young v. Ragen*, 337 U. S. 235.)

This Court, of course, will always inquire not only whether the Federal right was denied in express terms, but also whether it was denied in substance and effect. (*Norris v. Alabama*, 294 U. S. 587.)

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an illegal exaction of taxes the right to recover back the amount in dispute only after previous payment under protest, as the sole remedy against either the officer of the government, is a just and reasonable rule, sufficiently securing private rights, and convenient, if not necessary, to the interests of the public. We are referred to the revenue laws of the United States for illustration and example, and the question is put, why a similar provision, as it is assumed to be, should not be considered adequate as a remedy for the holders of coupons in Virginia, who have been denied the right to use them in payment of taxes." (P. 300.)

Whether a "tax" deprives the taxpayer of a Federal right is not dependent upon the State characterization, but upon the operation and effect of the "tax." (*Richfield Oil Corp. v. State Board of Equalization*, 329 U. S. 69.)

The enormous penalty provisions are violative of the Fourteenth Amendment. (*Cotting v. Kansas City Stock Yards Company*, 183 U. S. 79; *Ex parte Young*, 209 U. S. 123.)

A law which directly or indirectly imposes conditions upon the right to judicial relief so burdensome or arbitrary as to prevent judicial inquiry, or to coerce its abandonment or to restrain reasonable and free access to the courts, is unconstitutional. (*Ex parte Young*, *supra*.)

State regulations superimposed upon the criminal law but eliminating the safeguards of the criminal process do not satisfy due process. (*Bantam Books v. Sullivan*, 9 L. Ed. 2d 584.)

Procedures which impose criminal sanctions or punishment, procedures which authorize *ex parte* impairment of constitutional rights, are not validated by after the fact administrative or judicial remedies. (*Marcus v. Property Search Warrant*, 367 U. S. 717.)

1. The Scope of Section 17297.

The Attorney General's Brief, referring to Section 17297 declares the section has "the effect" of denying deductions "associated with the conduct of gambling activities" (p. 2).

Again we respectfully note that Section 17297 includes within the expression "illegal activities" and activities which "tend" to "promote" or "to further" or are "con-

nected" or are "associated" with illegal activities such disparate felonies and misdemeanors as:

(a) Felony of bribing an umpire of a ball game or other sporting event (Penal Code 337d);

(b) Misdemeanor of refusing to leave a race track when ordered (Penal Code 337.5);

(c) Misdemeanor of permitting minors to play games of chance where liquor is sold (Penal Code 336);

(d) Misdemeanor on part of District Attorney, etc. who fails to "inform" and "diligently" prosecute offenders under Chapter 10 (Penal Code 335);

(e) Felony of doping race horses, etc. (Penal Code 337f).

The California Legislature has evidentally accepted the novel theory that the sovereign power if given the legislative designation of "tax" or "deduction" extends to the enforcement of all penal offenses premised on administrative verdict of criminal guilt.

However, this Court has held that criminal sanction may be applied "only after" a determination of criminal guilt has been made in a criminal trial "hedged about with the procedural safeguards of the criminal process." (*Bantam Books v. Sullivan*, 9 L. Ed. 2d 584, 593.)

2. The California Refund Action.

California essentially enters a plea of abatement. Our citizens, it says, may yet prove in some tribunal they are not criminals. Acquittal, of course, is always a possibility.

Appellants, California declares, "after payment of the tax, will be entitled to a trial *de novo* respecting the validity of the assessments in question". (Brief p. 3.)

Such a trial is a non-jury trial; a trial requiring the taxpayer to assume the burden of proof,[2] a burden requiring proof of individual and personal freedom from violation of the California Penal Code through a past period of four years; a trial available only after the prepayment of criminal fines and penalties so enormous as to frustrate access to the court on the part of those who can pay, and to forbid access on the part of those who cannot pay.

It is respectfully submitted that it is a clear denial of due process to relegate Appellants to such a refund action in order to vindicate their constitutional right to be free from the stigma of criminal guilt.

This is true because the right to be free from the stigma of criminal guilt (the presumption of innocence)

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[2]California has successfully maintained that in tax refund actions involving assessments under Section 17297, the burden of proof in *Court* is upon the taxpayer and the refund action is not a jury trial. This contention is sustained on the theory that a refund action is a special statutory proceeding and the right to jury trial does not extend to such an action. Also, that the assessment and determination of the taxing officials are presumed to be correct; therefore, of course, the burden is upon the taxpayer. In *Hall v. Franchise Tax Board*, Superior Court of Sacramento County, No. 12952, (a refund action under Section 17297) the Attorney General summarizes his argument as follows:

"It is respectfully submitted that since the above entitled action is statutory only and plaintiffs have no common law remedy to recover a tax voluntarily paid, that there is no constitutional right to a jury trial in this case. Accordingly, defendant respectfully requests that the above entitled action be set for trial before the court, sitting without a jury.

Respectfully submitted,

STANLEY MOSK, Attorney General of the State of California

DAN KAUFMANN, Assistant Attorney General

EDWARD P. HOLLINGSHEAD, Deputy Attorney General

By EDWARD P. HOLLINGSHEAD

Attorneys for Defendant."

can not be measured in terms of money. Here, as in *Speiser v. Randall*, 357 U. S. 513, taxing officials purport to do no more than compute the amount of the taxpayer's monetary liability in accordance with customary taxing procedure. But in fact, they have undertaken to determine whether conduct is criminal. The ordinary proposed tax assessment creates a mere debt. Refund provides an adequate remedy. However, a refund action in this case involves more than the question of debt with its routine proof. It presents the formal issue of criminal guilt. The California Refund Action retains the burden of proof and the burden of coming forward with the evidence on the taxpayer. In a refund action, the administrative verdict of criminal guilt against the citizen persists. In a word, the criticisms which are properly directed against the statute in its administrative application are also justly directed at the judicial refund action. (*Poindexter v. Greenhow*, 114 U. S. 270.)

3. Federal Jurisdiction and the Procedural Aspects of the California Decision.

(a) The Withdrawal of All Judicial Remedies by Injunction, Writ of Mandate or Other Legal or Equitable Process.

California, by statute and constitutional provision, has denied to Appellants all judicial remedies by injunction, mandate, "or other legal or equitable process". Appellants, California says, now have only one remedy, the action for refund, after prepayment of the assessment.

The California Supreme Court, in the decision below, went on to review the local procedural rules governing issuance of the Writ of Prohibition. However, since

California has closed the door to all extraordinary relief, whether by mandamus, prohibition, certiorari, or injunction, local procedural rules governing issuance of the Writ of Prohibition in California, do not provide an adequate or independent basis of judgment so as to defeat federal jurisdiction. (*Wolfe v. North Carolina*, 364 U. S. 177, 185.) To state the proposition in another way, it is evident that California will not issue to Appellants an injunction, Writ of Mandate, Writ of Prohibition, Writ of Certiorari or any other extraordinary remedy or writ to protect or enforce the constitutional rights which they contend are *now* being impaired.

It should be noted in passing, however, that the availability and distinctions between the extraordinary writs in California has been the subject of long, amazing confusion and uncertainty.[3]

Also, it has been uniformally held that the California Courts will issue the appropriate extraordinary remedy, *i.e.*, mandate, injunction, certiorari, prohibition, depending upon the facts alleged in the Petition, and not upon the formal designation of the application.[4]

We reiterate that regardless of what procedural steps Appellants had taken, or what writ they had formally requested, California has taken the position that they are not *now* entitled to any form of judicial relief, except the California Refund Action. The effect of this decision, while cast in a procedural form, is to irrevocably deny now a substantial federal right of Appellant

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[3]See the Article—*Certiorarified—Mandamus*, 2 Stanford Law Review, p. 285.

[4]3 Witkin, *California Procedure*, Page 2567. *Witkin* is the accepted authority on California practice and procedure. In Appendix A, we set forth an excerpt from Witkin on this point.

and such State action is in fact affirmance of the tax assessment and a ratification and approval of the multiple impairment, supression and deprivation of Appellants constitutional rights.

Poindexter v. Greenhow, 114 U. S. 270;
Wolfe v. North Carolina, 364 U. S. 177;
Lipke v. Lederer, 259 U. S. 557;
Kennedy v. Mendoza-Martinez, 9 L. Ed. 2d 644.

(b) The California Administrative Proceedings.

The Brief of the Attorney General emphasizes that Appellants have had an extensive administrative hearing before the State Board of Equalization.

California follows the customary rule that, before seeking judicial relief, one aggrieved by administrative action must endeavor to exhaust the administrative remedies.

Again we note, however, that it is clear from the decision of the California Supreme Court that whether or not Appellants had sought administrative relief, or exhausted the administrative remedies, they would not have been entitled to any immediate form of judicial redress, such as by mandamus, prohibition, injunction, but would be required in all events to pursue the statutory refund action. In the context of this case, *after the fact* administrative relief will not save the prior arbitrary deprivation of constitutional right.

Kennedy v. Mendoza-Martinez, 9 L. Ed. 2d 644;
Lipke v. Lederer, 259 U. S. 557;
Bantam Books v. Sullivan, 9 L. Ed. 2d 584;
Marcus v. Property Search Warrant, 367 U. S. 717;
Poindexter v. Greenhow, 114 U. S. 270.

While Appellants were not required to seek administrative relief (*Speiser v. Randall, supra*) they have in endeavoring to follow the California rule, futilly exhausted their administrative remedies, except for the *proforma* decision on their Petition for Rehearing to the State Board of Equalization. At all times at the administrative level they have protested that the entire assessment and proceedings impaired their constitutional rights under the U. S. Constitution.

The administrative proceedings serve only to emphasize the arbitrary nature of California's action.

At the administrative hearings, Appellants were asked to disprove unspecified criminal charges. Assertion of protection under the Fifth Amendment was construed against them. (See Appendix "D"—Jurisdictional Statement.)

The State Board of Equalization even refused to rule upon the question of who had the burden of proof.[5]

There was utter failure of proof to show *individual* responsibility for any criminal conduct. The only eye witness testimony presented, as to the manner in which the games were conducted, was the testimony of a Mr. Buchanan, who observed one game *on one day for 35 minutes.*[5a] (Proceedings before the State Board of Equalization, p. 130, line 4.)

The other evidence consisted of the opinion of an expert, who had never seen the games played.

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[5]"Mr. Holden: The Board of Equalization has not made a determination of who has the burden of proof in any one of the cases arising under the illegal activities section." (Proceedings before the State Board of Equalization, p. 5.)

[5a]The assessments, of course, concerned a period of four years.

Many of the Appellants were mere joint venturers, investors or partners in the games and had not participated in the conduct of the games, or seen them played. There was no proof of individual participation of complicity on the part of any of the Appellants. It may be confidentially asserted, therefore, that by any standard there was no acceptable evidence established in the hearings before the State Board of Equalization or at the protest hearing before the Franchise Tax Board, that the Appellant taxpayers and each and all of them, for the four years involved in this case, were engaged in "illegal activities".

A criminal conviction which is not supported by acceptable or any evidence, is a denial of due process of law.

Thompson v. Louisville, 362 U. S. 199.

4. The Enormous Penalties Imposed in This Case.

In the case of the Appellants, Nathan and Ida Franklin, the assessments levied by administrative notice and approved by the State Board of Equalization are as follows:

Nathan and Ida Franklin	1951	12,839.70[6]
	1952	23,409.14
	1953	23,406.16
	1954	54,099.66
TOTAL		113,754.66[7]

[6]The 1951 assessment is smaller than the assessments for subsequent years. Section 17297 did not become effective until May 3, 1951. The Franchise Tax Board, in making the 1951 assessment, apparently prorated the assessment.

[7]See Opinion of the State Board of Equalization, Appendix to California's Brief.

There must be added to the Franklin assessment, six-percent interest which accrues from the date of assessment to the date of payment. As accrued to October 15, 1962, interest is in the sum of $57,714.21. The total assessment to that date, therefore, is $171,468.87.

As shown by Exhibit E to the Petition for Writ of Prohibition on file herein, the total net worth of the Franklins is the sum of $44,224.00, as of October 1, 1962.

While, as the Attorney General contends (Brief, p. 10) mere hardship is no defense to a tax assessment nor a defense to a refund action, it is evident that this case presents a levy passing beyond the bounds of hardship.

It is appropriation.

California argues that Appellants are given the same "procedural treatment" that is accorded to any businessman whose claim of a deduction of a business expense is "challenged" by the taxing agency. (Brief p. 10.) California further contends that some of the Appellants, after all, should have brought a "test case" in the California Courts, by paying a single assessment against one of the Appellants, some of which for certain years were less than $100.00. (Brief p. 10.)

It is clear, we think, that the summary denial of *all* deductions because of alleged criminality, is vastly different from the denial of specific deductions because of lack of proof of the validity of such deductions. It is fair enough to ask a taxpayer who claims deduction for rental to show proof of payment of rent—or of wages —or of repairs.

The assessment here bears no real similarity to such determination.

In the case of *The Black Out* and *Vogue, all* deductions were denied for the fiscal year 1953.[8] Those deductions included such routine business expenses as: Salaries & Wages, $104,844.44; Rent, $13,633.23; Pay Roll Taxes, $4,118.13;[9] City License, $1,002.00; Depreciation, $6,767.40;[10] Repairs, $2,650.70; Game Supplies, $1,720.75; Bad Checks—Cash Short, $1,148.08; Advertising, $661.04; Utilities and Telephone, $2,127.75; Professional Fees, $900.00; Patron Service, $6,230.74; Neon Signs, $252.00; Food, Smokes, etc. to patrons, $5,373.27; Insurance, $1,081.87; Janitor Supplies, $1,105.75; Miscellaneous Expense, $283.90.

The *ex parte* denial of all business expenses and the assessment of a tax upon gross receipts levied at the same rate as a tax imposed upon net income is necessarily arbitrary and void. (*Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550.)

The "test case" argument fails to mention the summary remedies California enjoys under its personal income tax law. These procedures include the right of jeopardy assessments and seizure. (*California Revenue & Taxation Code Section 18644, et. seq.*) Summary judicial judgments for the amount of the tax. (*Section 18861, et seq.*) Summary liens. (*Section 18881, et seq.*) Summary warrants having the force and effect of a Writ of Execution. (*Sections 18906 and 18907.*)

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[8]Also, of course, for 1951, 1952 and 1954. The year 1953 is selected for illustration only.

[9]The denial of a deduction for Pay Roll Taxes presents a question of special federal interest.

[10]The denial of a deduction for depreciation is doubtful. *Doyle v. Mitchell*, 247 U. S. 1479; *Burnet v. Logan*, 283 U. S. 404.

Constitutional rights are not dependent upon the question of whether great or small sums are claimed to be due. Thus the *de minimus* argument was rejected in *Lipke v. Lederer*, 259 U. S. 557. In *Lipke*, this Court issued an injunction (notwithstanding anti-injunction statutes) against a tax penalty. It was noted in the dissenting opinion that the taxpayer there had the remedy of paying under protest and in bringing an action to recover the amount paid, which in that case was the sum of $557.29.

The availability in *Lipke* of a refund action to recover this modest sum was held to be no grounds for denying injunctive relief against imposition of a criminal penalty in the guise of a tax founded upon the secret findings of administrative officers that the taxpayer was guilty of a crime.

5. Reply to Other Contentions in the Brief.

California cites *Hetzel v. Franchise Tax Board*, 161 Cal. App. 2d 224, 326 P. 2d 611. In *Hetzel*, the taxpayer filed an income tax return reporting income as a bookmaker and deducting wagering losses; no deductions other than wagering losses were claimed in the return.

Hetzel is, therefore, a case where the taxpayer has, in effect, confessed the receipt of income within the ambit of Section 17297. The case is thus vastly different from the case here, where Appellants deny criminal guilt.

The case of *Tank Truck Rentals, Inc. v. Commissioner*, 356 U. S. 30, and similar cases, are readily distinguishable. In *Tank Truck Rentals*, deductibility of state fines was denied on the grounds that such payments were not "ordinary and necessary" expenses. It was admitted that the taxpayer had paid the fines; thus, there was no issue of criminal guilt.

Finally, certain obvious distinctions must here be noted. Assessments such as fraud assessments, designed to aid and assist the administration and enforcement of taxing laws, are, of course, not criminal penalties or sanctions. (*Helvering v. Mitchell,* 303 U. S. 391.)

Statutes which impose essentially civil penalties and are not explicitly conditioned upon the commission of a crime, are not comparable to Section 17297. The distinction is noted in *United States v. Sanchez,* 340 U. S. 42. Speaking of the distinction between the procedural rules required in imposing a civil penalty, as distinguished from those which pertain to the imposition of criminal penalty, this Court, in *Sanchez,* unanimously ruled: (p. 45)

> "The tax levied by Sec. 2590(a)(2) is *not conditioned upon the commission of a crime.* The tax is on the transfer of marijuana to a person who has not paid the special tax and registered. Such a transfer is not made an unlawful act under the statute. Liability for the payment of the tax rests primarily with the transferee; but if he fails to pay, then the transferor, as here, becomes liable. It is thus the failure of the transferee to pay the tax that gives rise to the liability of the transferor. *Since his tax liability does not in effect rest on criminal conduct, the tax can be properly called a civil rather than a criminal sanction.* The fact Congress provided civil procedure for collection indicates its intention that the tax be treated as such. Helvering v. Mitchell, 303 US 391, 82 L ed 917, 58 S Ct 630 (1938). *Moreover, the Government is seeking to collect the levy by a judicial proceed-*

ing with its attendant safeguards. Compare Lipke v. Lederer, 259 US 557, 66 L ed 1061, 42 S Ct 549 (1922); Tovar v. Jarecki, 173 F2d 449 (CA 7th Cir 1949)."

Similarly, in *Kahriger,* 345 U. S. 22, the statute required those engaged in wagering, to pay a ten-percent excise tax, and to register and pay a registration tax. The entire structure of the tax is civil in its nature and is not dependent upon proof of crime. As noted by this Court, "the wagering tax with which we are here concerned, applies to all persons engaged in the business of receiving wagers regardless of whether such activity violates state law." (p. 26.)

In *Lewis v. United States,* 348 U. S. 419 (Brief p. 13) "An information was filed in the Municipal Court of the District of Columbia charging the Petitioner with violation of 26 U. S. C. 3290 in that he engaged in the business of accepting wagers without paying the occupational tax imposed by that section." (p. 419.)

The traditional criminal proceeding, used in *Lewis,* is much different from the administrative verdict of guilt California seeks to sustain here.

The case here is ruled by *United States v. Constantine,* 296 U. S. 287, on the issue of penalty versus tax.

Several minor points perhaps should be noted. The reference to the Attorney General's Opinion (Brief p. 5, 17 Ops. Cal. Atty. Gen. 64) is inaccurate. The opinion of the Attorney General relates to a wholly different game. Furthermore, the opinion was rendered February 19, 1951; the statute involved here became effective May 3, 1951.

Reference to the action of the Chief of Police (p. 9) is inaccurate. His hesitancy was promptly restrained and enjoined by the Superior Court of Los Angeles County. (See p. 3, Petition for Writ of Prohibition.)

The Brief fails to note that in the decision of *Schur*, 47 Cal. 2d 11, the California Supreme Court in effect reinstated the findings of the City Council of the City of Santa Monica, that the games here involved were games predominantly of skill. The findings of the City Council were introduced by the Franchise Tax Board in the hearing before the State Board of Equalization, but were ignored. However, this does not alter the fact that the determination of the City Council was, as held in *Schur*, the determination of a quasi-judicial body having jurisdiction. The judgment of the Council never having been properly set aside or reversed, is therefore, still effective.

Conclusion.

An extensive search has revealed no case (and none has been cited by the Attorney General) in which an administrative decision that a crime has been committed has been upheld as the valid basis of a tax assessment or pretended tax assessment where there was neither an admission of guilt, as in *Hetzel*, nor a previous or concurrent adjudication by a court in a criminal proceeding, that a crime has been committed. A declaration that California's position is valid, would be a declaration that taxing officials may tax as criminal any conduct which it may choose to call criminal, despite denial of guilt, despite civil proceedings to the contrary, or despite the fact there has been no criminal proceedings adjudging guilt. If the taxing authorities are truly in-

dependent in determining what is criminal conduct, a tax for violation could be imposed even where the accused has been adjudged "not guilty" in a criminal proceeding. Such summary administrative verdict of criminal guilt is clearly contrary to the due process clause of the Fourteenth Amendment of the U. S. Constitution, and the withdrawal of all present remedies by California, to contest or challenge such administrative verdict of criminal guilt, is a clear and final denial of federal right.

This Court's jurisdiction in this momentous case is, therefore, clear.

Respectfully submitted,

THOMAS W. LESAGE,
Counsel for Appellants.

APPENDIX A.

Excerpt From 3 Witkin, California Procedure (Page 2567.)

It has been seen (*supra*, Sec. 13, *et seq.*) that the distinctions between the functions of the various extraordinary writs are not as clearly drawn as might be desired. In consequence it is sometimes difficult to determine which writ is appropriate to give the relief sought. A careful pleader who is aware of the uncertainties in this field will often state his prayer in alternative form; *e.g.*, for prohibition or mandamus, or prohibition or certiorari; or he may ask for two writs. (*Lankton v. Superior Court* (1936), 5 Cal. 2d 694, 55 P. 2d 1170; *Golden State Glass Corp. v. Superior Court* (1939), 13 Cal. 2d 384, 90 P. 2d 75; *Evans v. Superior Court* (1939), 14 Cal. 2d 563, 59 P. 2d 107.) If, however, by the label and prayer of his petition he seeks a writ to which he is not entitled, but nevertheless the petition contains allegations sufficient to justify the granting of a different writ, is he entitled to that writ?

A few decisions, which deny the privilege of changing from prohibition to certiorari, are explainable on their special facts: The complete record, including the evidence before the trial court, was not brought up, and a review of the judgment or order could not be had. (See *Davis v. Superior Court* (1925), 71 Cal. App. 646, 236 Pac. 151; *O'Brien v. Olson* (1941), 42 Cal. App. 2d 449, 458, 109 P. 2d 8; *cf. Donner Finance Co. v. Municipal Court* (1938), 28 Cal. App. 2d 112, 115, 81 P. 2d 1054 [additional reason stated that this was appeal from superior court judgment denying prohibition, and theory cannot be changed on appeal].) If

an adequate record is brought up with the petition for prohibition, the obstacle is overcome, and, where this is necessary for relief, the proceeding may be treated as one in certiorari. (See *infra*, Sec. 72.)

Apart from the narrow objection of the foregoing decisions, the cases uniformly follow the modern principle of pleading that neither mislabeling nor a defective prayer will bar relief justified by proper allegations and proof. (See *Van Hoosear v. R. R. Commission* (1922), 189 Cal. 228, 207 Pac. 903; *Swim v. Superior Court* (1924), 193 Cal. 539, 226 Pac. 2; *Board of Trustees v. State Board of Equalization* (1934), 1 Cal. 2d 784, 787, 37 P. 2d 84; *Sekt v. Superior Court* (1944), 24 Cal. 2d 73, 77, 147 P. 2d 568; *Boren v. State Personnel Board* (1951), 37 Cal. 2d 634, 638, 234 P. 2d 981; *cf. Hostetter v. Alderson* (1952), 38 Cal. 2d 499, 500, 241 P. 2d 230 [complaint for declaratory relief treated as petition for mandamus]; and see *infra*, Sec. 72.)

Sec. 72 Illustrations

The following cases, classified to indicate the nature of the mistaken choice, illustrate the principle set forth in the preceding section:

(a) *Mandamus Issued Though Petition Sought Certiorari.* (See *Traders Credit Corp. v. Superior Court* (1931), 111 Cal. App. 663, 296 Pac. 99; *Mash v. Superior Court* (1923), 192 Cal. 258, 259, 219 Pac. 742; *Board of Trustees v. State Board of Equalization* (1934), 1 Cal. 2d 784, 37 P. 2d 84.)

(b) *Mandamus Issued Though Petition Sought Prohibition.* (See *Fritz v. Superior Court* (1936), 18 Cal. App. 2d 232, 63 P. 2d 872; *Gromeeko v.*

Superior Court (1952), 114 Cal. App. 2d 754, 757, 251 P. 2d 29; *Schaefer v. Superior Court* (1952), 113 Cal. App. 2d 428, 439, 238 P. 2d 96; *Simmons v. Superior Court* (1950), 96 Cal. App. 2d 119, 132, 133, 214 P. 2d 844, *infra*, Sec. 77.)

(c) *Relief on Certiorari Granted Though Petition Sought Prohibition.* (See *Finn v. Butler* (1925), 195 Cal. 759, 765, 235 Pac. 992; *A. G. Col Co. v. Superior Court* (1925), 196 Cal. 604, 606, 238 Pac. 926; *Van Hooser v. R.R. Commission* (1922), 189 Cal. 228, 207 Pac. 903, *Traffic Truck Sales Co. v. Justice's Court* (1923), 192 Cal. 377, 220 Pac. 306, *infra*, Sec. 75.)

(d) *Relief on Certiorari Granted Though Petition Sought Mandamus.* (See *Walker v. San Gabriel* (1942), 20 Cal. 2d 879, 129 P. 2d 349, *supra*, Sec. 16; *cf. Sekt v. Superior Court* (1944), 24 Cal. 2d 73, 147 P. 2d 568, *infra*, Sec. 75.)

(e) *Prohibition Issued Though Petition Sought Mandamus.* (See *Hampton v. Superior Court* (1952), 38 Cal. 2d 652, 242 P. 2d 1 [to prevent retrial after reversal with directions to enter judgment]; *State Board of Equalization v. Superior Court* (1935), 5 Cal. App. 2d 374, 379, 42 P. 2d 1076.)

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